

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 1, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP547

Cir. Ct. No. 2004JC33

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN THE INTEREST OF FATIMA K., A PERSON UNDER THE AGE OF 18:

ROCK COUNTY DEPARTMENT OF HUMAN SERVICES,

PETITIONER-RESPONDENT,

v.

YASMIN H.,

RESPONDENT-APPELLANT,

MOHAMMAD K.,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Rock County:
RICHARD T. WERNER, Judge. *Affirmed.*

¶1 HIGGINBOTHAM, J.¹ Yasmin H. appeals a trial court order dismissing a Child in Need of Protection and Services (CHIPS) petition regarding her daughter, Fatima K. Yasmin argues the trial court erred in denying her meaningful participation in the fact-finding hearing after she admitted the allegations in the CHIPS petition and Fatima's father, Mohammad K., contested the allegations in the petition. Yasmin also argues the trial court erred in dismissing the CHIPS case with prejudice and failing to order a dispositional hearing when admissions to the facts alleged in the petition were entered by both Yasmin and the guardian ad litem. Finally, Yasmin argues the trial court abused its discretion by not granting her motions to compel discovery and continue the trial pending completion of discovery when Mohammad was given proper notice for depositions, did not complete the deposition and there was no showing under WIS. STAT. § 804.05(5) to limit or terminate the deposition. We disagree with all these contentions and affirm the trial court's order.

FACTS

¶2 On April 1, 2004, the Rock County Department of Human Services filed a petition for protection or services under WIS. STAT. ch. 48. The petition alleged Fatima K., child of Yasmin H. and Mohammad K., was in need of protection or services because she was at substantial risk of sexual abuse. At the time the petition was filed, Yasmin and Mohammad were involved in a divorce proceeding. The petition alleged Fatima had been sexually abused by Mohammad

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

and during Mohammad's previous divorce, there were allegations he had sexually abused another daughter. The petition further alleged that during this prior divorce, a trial court made a specific finding that Mohammad had, in fact, sexually abused this other daughter. As a result, Rock County filed the current CHIPS petition on behalf of Fatima.

¶3 The parties appeared before the trial court for a plea hearing; Yasmin admitted the allegations in the petition while Mohammad denied them and requested a jury trial. Mohammad then filed a motion seeking an order prohibiting and/or limiting Yasmin's participation in the jury trial in this matter.

¶4 Following a hearing, the trial court granted Mohammad's motion and prohibited Yasmin from participating in the jury trial. On October 21, 2004, Yasmin filed a motion to compel discovery in order to continue Mohammad's deposition and to postpone the trial pending completion of discovery. The trial court denied the motion.

¶5 A jury trial was held wherein Yasmin was not allowed to participate in any of the fact-finding proceedings. The jury returned a verdict finding (1) reliable and credible evidence existed that another child in Fatima's home had been the victim of abuse but (2) Fatima was not at substantial risk of becoming a victim of abuse.²

¶6 Yasmin subsequently moved the court to schedule a dispositional hearing based upon her and the guardian ad litem's admissions. In addition, Yasmin asked for a new trial and fact-finding hearing, arguing she had been

² Yasmin does not challenge the jury's fact-finding.

denied meaningful participation in the fact-finding hearing, that her request to compel discovery had been erroneously denied and that certain trial errors had occurred during the course of the fact-finding hearing. Following a hearing, the trial court denied the motions and the CHIPS petition was dismissed with prejudice. Yasmin appeals.

DISCUSSION

¶7 Yasmin first argues the trial court erred in denying her meaningful participation in the jury trial after she admitted the allegations contained in the petition. Yasmin claims such a denial was contrary to her due process and constitutionally protected rights as a parent; she asserts the language of WIS. STAT. ch. 48 suggests a parent has the right to participate and the guardian ad litem was allowed meaningful participation after entering a similar admission. Yasmin further argues trial errors occurred to which she could not object because she was prohibited from participating and that her lack of participation is contrary to public policy. We disagree.

¶8 This case involves the construction of statutes, a question of law we review without deference to the trial court. *Family Servs., Inc. of Barron County v. Gary W.*, 2003 WI App 132, ¶5, 265 Wis. 2d 681, 666 N.W.2d 84. Yasmin is correct that nothing in the statutes specifically indicates a parent who admits to the allegations in a CHIPS petition is prohibited from participating in a jury trial when the other parent contests the allegations. However, WIS. STAT. § 48.30 addresses a plea hearing in a CHIPS case and states, in relevant part:

(2) At the commencement of the hearing under this section the child and the parent ... shall be advised of their rights as specified in s. 48.243 and shall be informed that a request for a jury trial or for a substitution of judge under s.

48.29 must be made before the end of the plea hearing or be waived....

(3) If a petition alleges that a child is in need of protection or services ... the nonpetitioning parties ... shall state whether they desire to contest the petition....

(6)(a) If a petition is not contested, the court shall set a date for the dispositional hearing which allows reasonable time for the parties to prepare

....

(8) Before accepting an admission or plea of no contest of the alleged facts in the petition, the court shall:

(a) Address the parties present including the child ... and determine that the plea or admission is made voluntarily with understanding of the nature of the acts alleges in the petition and the potential dispositions.

(b) Establish whether any promises or threats were made to elicit the plea or admission and alert unrepresented parties to the possibility that a lawyer may discover defenses or mitigating circumstances which would not be apparent to them.

(c) Make such inquiries as satisfactorily establishes that there is a factual basis for the plea or admission of the parent and child

The plain language of WIS. STAT. § 48.30(2) provides that the child and the parent must demand a jury trial before the end of the plea hearing or their rights under WIS. STAT. § 48.243 are waived. The rights waived by entry of an admission to the petition include the rights enumerated at WIS. STAT. § 48.243:

(c) The right to remain silent and the fact that silence of any party may be relevant.

(d) The right to confront and cross-examine those appearing against them.

(e) The right to counsel under s. 48.23.

(f) The right to present and subpoena witnesses.

(g) The right to a jury trial.

(h) The right to have the allegations of the petition proved by clear and convincing evidence.

Thus, by admitting the allegations of the petition, Yasmin waived all these rights. It follows that by waiving these rights, Yasmin in essence, waived the right to meaningfully participate in the fact-finding hearing.³ Moreover, Yasmin presents no authority supporting her assertion of a right to participate in a jury trial in a CHIPS proceeding after she admitted the allegations and thus waived her rights.

¶9 Yasmin's remaining arguments are premised upon the validity of her first argument. Because we have rejected the idea that she was entitled to participate in the fact-finding hearing after entering an admission to the allegations in the petition, we reject her remaining arguments as well.

¶10 Yasmin argues the trial court erred in dismissing the CHIPS petition with prejudice and failing to order a dispositional hearing when admissions to the

³ The WISCONSIN JUDICIAL BENCHBOOK, vol. IV, Juvenile, JV 6-12 through 6-13 (2003), also indicates WIS. STAT. § 48.30(8) requires a court to address the parent personally and determine the voluntariness of the plea and an understanding of the rights waived by entry of the plea. Our review of the plea colloquy suggests the court did not make the necessary inquiry to determine whether Yasmin's admission was knowing and voluntary. However, Yasmin does not address the voluntariness of her plea, either before us on appeal or before the trial court. Accordingly, we deem this issue waived. See *Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), *superseded on other grounds by* WIS. STAT. § 895.52.

We also determine the trial court's purported failure to ascertain Yasmin's plea was knowingly and voluntarily made to be harmless error. Wisconsin law establishes an error is harmless unless the parent shows actual prejudice. *State v. Kywanda F.*, 200 Wis. 2d 26, 37, 546 N.W.2d 440 (1996). The allegations in the CHIPS petition were aimed solely at Mohammad, not Yasmin. Both the Department and the guardian ad litem participated in the trial and advocated consistent with Yasmin's position. The jury returned a verdict finding reliable and credible evidence existed that another child in Fatima's home had been the victim of abuse but Fatima was not at substantial risk of becoming a victim of abuse. If we were to reverse the order and remand this matter to the trial court for an evidentiary hearing on the voluntariness of Yasmin's plea, the results would not change. Mohammad, the sole focus of the CHIPS petition, cannot be brought back into this action absent new evidence or other legal grounds not presented here.

facts alleged in the petition were entered by both Yasmin and the GAL. However, a dispositional hearing was unnecessary after Mohammad was dismissed from the action. The sole focus of the CHIPS petition was Mohammad, with the Department alleging Fatima was in danger because another child in Mohammad's household had been the victim of abuse. The jury determined Fatima was not at substantial risk of becoming a victim of abuse. Consequently, there was no reason to hold a dispositional hearing. We conclude the trial court did not err in dismissing the CHIPS petition with prejudice and by not proceeding to a dispositional hearing.

¶11 WISCONSIN STAT. § 48.31(2) supports our conclusion and states

If the court finds that the child ... is not in need of protection or services that can be ordered by the court or if the court or jury finds that the facts alleged in the petition have not been proved, the court shall dismiss the petition with prejudice.

When the jury found grounds had not been established against Mohammad, the sole focus of the CHIPS petition, the trial court had no choice but to dismiss the petition with prejudice.

¶12 In addition, the purpose of a dispositional hearing is as follows:

(1) INTENT. In any order under s. 48.345 or 48.347 the judge shall decide on a placement and treatment finding based on evidence submitted to the judge. The disposition shall employ those means necessary to maintain and protect the well-being of the child or unborn child which are the least restrictive of the rights of the parent and child, of the rights of the parent and child expectant mother or of the rights of the adult expectant mother, and which assure the care, treatment or rehabilitation of the child and the family, of the child expectant mother, the unborn child and the family or of the adult expectant mother and the unborn child, consistent with the protection of the public. When appropriate, and, in cases of child abuse or neglect or unborn child abuse, when it is consistent with the best

interest of the child or unborn child in terms of physical safety and physical health, the family unit shall be preserved and there shall be a policy of transferring custody of a child from the parent or of placing an expectant mother outside of her home only when there is no less drastic alternative. If there is no less drastic alternative for a child than transferring custody from the parent, the judge shall consider transferring custody to a relative whenever possible.

WIS. STAT. § 48.355(1). After Mohammad's dismissal, the only remaining parties were Fatima, represented by her guardian ad litem, and Yasmin, neither of whom were alleged to have placed Fatima in danger. Thus there was no disposition for the trial court to order to address the perils outlined in the petition.

¶13 Finally, Yasmin argues the trial court abused its discretion by not granting her motions to compel discovery and continue the trial pending completion of discovery when Mohammad was given proper notice for depositions and failed to complete the deposition with no proper showing under WIS. STAT. § 804.05(5) to limit or terminate the deposition. But as noted above, once Yasmin entered an admission to the allegations of the petition, she gave up her rights to participate in the jury trial. Yasmin had no right to participate in any pretrial discovery because she had no right to participate in the trial.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

